IN THE HIGH COURT OF JUDICATURE OF BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.428 OF 2002

Firoz Hassanali Rupani.)
at present confined in Yervada)
Central Prison, Pune, previously)
residing at Pearl Harbour Bld.)
Tulsiwadi, Mazgaon, Mumbai.) ..Appellant.
(org.Accd.No.3)

V/s.

1. Intelligence Officer Narcotics)
Control Bureau Mumbai, Zonal)
Unit, Exchange Building,)
Ballard Pier,)
Mumbai 400 032.)
)
2. The State of Maharashtra.) ..Respondents.

WITH

CRIMINAL APPEAL NO.371 OF 2002

Abdul Rehman Alifaarah)
Somalian National(at present)
in Judicial Custody at Yerwada)
Central Prison) r/at Villa Ali)
Farah, P.O.Box No.600, National)
Road, Mogdishu -Somalia.) ..Appellant
) (Org.Accd.No.2)

V/s.

1. Intelligence Officer,)
Narcotics Control Bureau)
Mumbai Zonal Unit, Mumbai)
)
2. The State of Maharashtra) ..Respondents.

WITH

CRIMINAL APPEAL NO.372 OF 2002

Abdulla Mohammed Shirre)
@ Daulat, Somalian National)
(at present in Judicial custody)
at Yerwada Central Prison r/o)
Hobyo, Dist.Goal Kaayo,)

Somalia.) ..Appellant.
(org.Accd.No.1)

V/s.

1. Intelligence Officer,)
Narcotics Control Bureau)
Mumbai Zonal Unit, Mumbai.)
)
2. The State of Maharashtra.) ..Respondents.

Mr.K.M.Sanghani, for appellant in Cr. Appeal No.428/2002.

Mr.Ayaz Khan, for appellant in Cr.Appeal No.371/2002.

Mr.S.V.Kotwal, for appellant in Cr.Appeal No.372/2002.

Mr. D.A.Nalawade, P.P. for Union of India.

Mr. Y.A.Shinde, APP for State.

CORAM: A.M.KHANWILKAR,J

DATE: APRIL 2, 2007.

P.C.:

1. This common Judgment will dispose of all the three appeals. The appellants before this Court were indicted for offence under section 29 r/w 8(c) and 21; and section 21 r/w 8(c) of Narcotic Drugs and Psychotropic Substances Act, 1985(hereinafter referred to as the N.D.P.S.Act for the sake of brevity). The Accused No.1 and 2 were additionally charged for offence under section 27A r/w 21 and 8(c) of N.D.P.S.Act. The trial Court by the impugned Judgment and Order has found all the three accused guilty of offence punishable under section 8(c) r/w

29 and Section 8(c) r/w 27(A) of N.D.P.S. Act. The accused No.1 is additionally found guilty of offence under section 8(c) r/w 21 of N.D.P.S. Act. The Accused Nos. 1 to 3 have been ordered to undergo rigorous imprisonment for a period of 10 years each and to pay fine of Rs.One Lakh each, in default to undergo rigorous imprisonment for a period of three months. As the accused No.1 is additionally found guilty of the offence punishable under Section 8(c) r/w 21 of N.D.P.S.Act, is directed to undergo further rigorous imprisonment for a period of 10 years and to pay fine of Rs.One Lakh, in default to undergo rigorous imprisonment for a period of three months. The trial Court has however, ordered that both the substantive sentences against Accused No.1 to run concurrently.

2. Briefly stated, the prosecution case is that on 16th June, 1999 an Intelligence report was received by NCB Officer J.S.Dubey(P.W.1) that on 17th June, 1999 Accused No.3 was likely to deliver heroin powder to foreign nationals (described as Negro persons) at given time and place. The said officer is said to have taken direction from his superiors in relation to the said intelligence report. It is stated that the superiors approved the follow-up

action of arranging a drag-net near the appointed place and time. Accordingly, the NCB Officers along with two panch witnesses arranged a drag-net near the Mazgaon Garden at around 7.00 a.m. on 17th June, 1999. It was witnessed by the said NCB officials and panchas that first one person with beard arrived on the spot having one plastic carry bag in his hand. Thereafter, two foreign nationals (accused Nos. 1 and 2) arrived on the scene. They walked upto the said beard person, who was holding a plastic bag in his hand, who is none other than accused No.3. It was then noticed that all these persons started discussing something. Thereafter, the accused No.3 was seen to be handing over the plastic bag to accused No.1. The officials, who were in hiding, were signalled to surround the accused persons. When the officials started moving forward, accused No.3 appears to have recognised the NCB officers and shouted "NCB... run". Soon thereafter, all the three accused started running away from the scene. The accused No.3 was chased by P.S.Nambudari (P.W.3). However, the said accused managed to escape and disappeared in the by-lanes. The other officials however, were able to grab the accused Nos.1 and 2 on the spot. At that time, the accused No.1 was holding the said plastic bag. The Officials, in the presence

of panchas, enquired with the said accused persons about the contents of the bag. The accused in turn disclosed that it contained contraband item heroin. On that, the officials expressed desire to take search of the bag. The accused persons were told that the search can be taken in the presence of gazetted officer or Magistrate. However, the accused Nos. 1 and 2 (persons who were accosted on the spot), gave no objection for being searched by the NCB officials. The accused also offered search of the bag. On taking search of the accused Nos.1 and 2 as also of the plastic bag in possession of accused No.1, in the presence of panchas, officials found that the bag contained three packets. Initially, one packet was opened and small portion from the bulk therein was taken out. Field test was immediately conducted on the said sample with the help of the apparatus, which was carried by the officials to the spot. The test was done in the presence of the panchas. The test reported positive of heroin. Therefore, the other two packets were also unpacked and field test was carried out on the small portion taken out from the bulk therein, which tested positive. The Officials thereafter, in the presence of panchas weighed the small portion from each packet to be taken as sample for being forwarded to the

Chemical Analysers of Dy.C.C.New Custom House and Forensic Science Laboratory. Accordingly, 5 grams of substance from each packet was taken out and kept as sample in small polythene bag, which were duly sealed and kept in envelopes. The envelopes were then sealed and initials of the officials, panchas as well as the accused, were taken. Panchanama regarding search and seizure was completed on the spot.

3. Thereafter, police party alongwith accused No.1 and 2 moved to the police station. On reaching police station, summons was issued to the accused Nos. 1 and 2 to appear and make disclosure for the purpose of enquiry. Consequent thereto, the statements of both the accused, accused No.1 and 2 came to be recorded. It is the prosecution’s case that the statements so recorded are voluntary statements made under section 67 of the NDPS Act, where the accused have confessed about their involvement in the offence in question. As mentioned earlier the accused No.3 escaped from the scene. He was not traceable for some time. In the circumstances, investigation in so far as accused No.1 and 2 progressed and on completion whereof charge-sheet came to be filed against the said accused.

4. As the accused Nos. 1 and 2 pleaded not guilty, the trial commenced. While recording of evidence was in progress on 9th April, 2001, accused No.3 was arrested in connection with some other criminal case of same nature. He was produced before the Court for remand in that case. At that time, application was made by the investigating Officer to give custody of the accused No.3, which was required for the present case. Before producing accused No.3 in Court, it appears that his statement(Ex.43), purported to be under section 67 of the Act was recorded, wherein he has confessed about his involvement in the present case. Be that as it may, the trial in the present case was deferred. Moreover, pursuant to the order passed on application Exh. 30, the Investigating Officer took over custody of accused No.3 in relation to the present case. Investigation as against accused No.3 was commenced after his arrest and on completion thereof, further charge-sheet came to be filed indicting the accused No.3 of the alleged offence. The trial Court proceeded with the trial on the basis of both the said charge-sheets. The trial Court has recorded that the parties agreed for that course and the trial was continued by recalling the witnesses already

examined. Thereafter, the trial was concluded by examining all the prosecution witnesses.

5. On the basis of the evidence, which has come on record, the trial Court proceeded to record finding of guilt against each of the accused- Accused No.1 to 3 and convicted and sentenced them for the offence as mentioned in the opening part of the Judgment. The trial Court has considered the plea of the accused about violation of section 42 of the Act, which came to be negatived. The trial Court then discussed the evidence of the prosecution witnesses and proceeded to hold that the same was truthful and reliable. It found that the evidence would establish the events as unfolded, as spoken by the witnesses. It has held that the evidence of prosecution witnesses was fully corroborated. The trial Court has then adverted to the plea of the defence about non-compliance of section 50 of the Act and has negatived the same. The trial Court has noticed that the main criticism of the defence in relation to the evidence of P.W.2 was to suggest that the witness must have visited the scene of offence for the first time on 2nd April, 2001 and had no occasion to visit that spot earlier, much less on the date of incident on 17th June, 1999. The trial Court has also dealt

with the criticism of the defence regarding description in Exh.20 panchanama, Exh. 21 and 22. It has then considered the argument of the defence that before taking personal search, both the accused were jointly appraised about their rights, which was not in accordance with the legal requirement. The Court however has taken the view that from the evidence it appears that both the accused were appraised about their rights independently. The trial Court has then adverted to the argument of the defence that the officials before laying drag-net did not think it necessary to make arrangement to keep any gazetted officer or Magistrate present, if search before them was required to be taken, depending on the stand of the accused. The trial Court has then discussed the evidence of P.W.2 and P.W.4 alongwith the documentary evidence Exh. 20, 21 and 22 and 108 to answer the material issue in favour of the prosecution. The trial Court has also noticed the argument of the defence that in the panchanama Exh. 20, there is no endorsement that the same was read over and explained to panch(P.W.4). It is however, found that there was such endorsement at the last page and no mention thereof on the previous pages-1 to 6 would affect the genuineness of that position. The trial Court has also referred to the argument of

the defence that it was obligatory on the officials to inform the accused before starting recording of panchnama to remain silent. The trial Court has also considered the challenge of the defence to the panch witness(P.W.4) and found that the case made out by the defence in the cross-examination does not affect the truthfulness of the said witness. It found that the evidence of P.W.4 was natural and truthful. The trial Court has then considered the defence case about non-arrest of the accused No.3. The next argument of the defence dealt with by the trial Court is that the accused No.1 and 2 had no knowledge of English. The assertion of accused Nos. 1 and 2 that they had no knowledge about English, that plea has been negatived relying on the intrinsic material, which has come on record to show that the said accused persons were familiar with English language and in fact interacted in that language. The trial Court has also adverted to the evidence of P.W.8 and 9, which would indicate the movement of accused No.1 during the relevant period. The trial Court has also noted that the accused No.2 had arrived in Mumbai obviously in connection with the deal, which eventually did not materialise and was exposed by the officials. The trial Court has then adverted to the argument of accused No.2 that the statement

purportedly recorded under section 67 of the Act was of no avail and in any case was not binding on this accused as he had retracted the same. The argument regarding retraction as well as no knowledge of English put forth on behalf of the accused has been negatived by the trial Court on the finding that it is an after-thought and false plea. The trial Court has then proceeded to consider the argument of the defence that the Chemical Analyser's report dated Exh. 26 and 27 will be of no avail as material details are not mentioned therein. Besides, on account of non-examination of the Chemical Analyser, such report cannot be looked into. Even that argument has been negatived by the trial Court. Taking totality of the evidence on record, the trial Court recorded finding of guilt against the respective accused and ordered them to suffer R.I. of 10 years and fine of Rs.One Lakh each on different counts. This decision is subject matter of challenge in the present appeals.

6. During the hearing of these appeals, counsel appearing for accused No.2 invited my attention to the pending Criminal Application No. 3870 of 2003. He invited order on the said application. By the said application, it was prayed that the prosecution

be directed to produce percentage report in respect of the present case. Further direction was prayed that the Chemical Examiner i.e. DYCC and FSL be examined and it would be just, proper and necessary to record their evidence in exercise of powers under section 391 of Cr.P.C. in the fact situation of this case. Counsel appearing for all parties were heard on that application and after considering all the relevant aspects, the said application was disposed of vide order dated 8th November, 2006. In terms of the said order, the Chemical Analyser was summoned to appear as witness. For, it was noticed that the trial of this case was pending on 2nd October, 2001, the provisions of amended provisions of 1985 Act would be attracted in view of the exposition of the Supreme Court in the case of **Basheer @ N.P.Basheer V/s. State of Kerala** reported in **(2004) 3 SCC 609.** Accordingly, one Jayant Purshottam Kulkarni, Assistant Director in Forensic Science Laboratory, State of Maharashtra, Kalina appeared and deposed before this Court giving particulars about the procedure adopted in testing the samples and the outcome of the tests so conducted on the samples sent to that laboratory pertaining to the present case. This witness has been extensively cross-examined. The evidence of this witness was recorded without the

personal presence of the accused as the accused had waived that right which fact is recorded in the order dated 8th November, 2006. I shall deal with that evidence a little later. Suffice it to observe that besides the report of the forensic Science Laboratory, which was already exhibited during the trial, further evidence has been led before this court in the form of evidence of P.W.11 as well as documents brought on record during his evidence, which have been separately marked as respective exhibits.

7. The thrust of the argument canvassed on behalf of the accused before this Court was to first criticize the prosecution evidence in relation to the factum of raid. While doing so, truthfulness of the version of P.W.2 as well as P.W.4 who acted as panch was put in issue. Then the evidence regarding arrest of respective accused was criticized. The next criticism was regarding search and seizure of article and procedure observed by the officials. It was argued that search and seizure will have to be discarded as there was no independent evidence. The evidence of P.W.4 panch was untrustworthy. The next argument was in relation to the sample procedure adopted by the officials, that included sealing

procedure. Then the most debated argument was that the sample packets were tampered. In any case, the evidence would speak that there was possibility of tampering of samples. Besides, the sample, which was sealed, was not the same which was taken out from the bulk; and moreso, what was sealed (sample) was not the same packet sent to the Chemical Examiner. It was next contended that the bulk was not properly preserved and produced before the Court in time. The other debated issue on behalf of the defence is that, the Chemical Examiners' reports were of no avail. On such report, contends learned counsel, the prosecution case cannot stand; as it was bereft of necessary details. It was then contended that even the evidence of Chemical Examiner(P.W.11), which has now come on record will be of no avail to the prosecution. It was then contended that there was variance in the result of field test conducted on the spot, which indicated substance Acetyl Morphine, whereas the Chemical Analyser has deciphered the sample as Diacetyl Morphine and this variance has remained unexplained, which was fatal. It is lastly contended that the statement of accused purportedly recorded under section 67 of the Act was of no avail. It does not take the colour of confession statement at all. In any case, the same was involuntary and

has been subsequently retracted, for which reason will be of no avail. This is the substance of the argument canvassed on behalf of the counsel for the accused to persuade this Court that the finding of guilt recorded against the appellants/accused cannot be sustained either on facts or in law. It is submitted that at any rate this was a case of giving benefit of doubt to the appellants.

8. On the other hand, the Public Prosecutor would contend that some error here or there committed by the trial Court cannot be the basis to overturn the finding of guilt as recorded against the appellants. According to him, in addition to the reasons recorded by the trial Court, there was tangible material to uphold the finding of guilt, on proper analysis of the prosecution evidence. In his submission, no interference is warranted with the final opinion recorded by the trial Court regarding finding of guilt against the appellants in relation to the offence in question. Counsel appearing for both the sides have relied on several decisions. I shall advert to those decisions at the appropriate places, while considering the stand of the parties in the context of the issues that will be discussed in this Judgment.

9. Accordingly, I shall now proceed to consider the prosecution evidence in relation to the events as unfolded. It is the prosecution case that prior intelligence report was received on 16th June, 1999 at around 19.00 hours from a reliable source- that one Firoz Rupani son of Hasan Ali(Accused No.3) was likely to deliver a substantive quantity nearly 3 kgs. of heroin to negro persons at the entrance of Mazgaon Garden at about 7.30 hours on 17th June, 1999. The information also disclosed that said Firoz has grown beard as of now and that in the past he was involved in a case booked by the NCB Mumbai. On receipt of this intelligence report, P.W.1- J.S.Dubey immediately submitted intelligence note to his superior officers. He first placed that report before Assistant Director Shri C.P.Vijayadharan. That officer took note thereof and put his signature and date of the same day. Thereafter, intelligence note was placed before the Zonal Director Mr.S.C.Rohotgi(P.W.10). Even Zonal Director (P.W.10) made endorsement and put his dated signature thereon. The note has been proved by P.W.1 and has been exhibited as Exh. 18. P.W.1 has spoken about the movement of the intelligence note prepared by him and the signatures of the respective superior officials

thereon have been identified by this witness. Besides, examining the P.W.1, prosecution also relied on evidence of P.W.10, who had the occasion to put his dated signature on the intelligence note Exh. 18. Although this witness has been cross-examined, his version has remained unshaken. Indeed, it was argued that there was no contemporaneous record to show as to the source from where the intelligence report was received by J.S.Dubey. Referring to subsection (2) of section 42 of the Act, it was contended that it is obligatory for the official to take down any information in writing to make note of such details. On plain language of section 42(2), all that the officer is obliged to comply is to send copy of such report to his immediate superior within 72 hours. In so far as that requirement is concerned, the same has been complied with in all respects, as can be seen from the evidence of P.W.1 and P.W.10 as well as the note at Exh. 18. Non-mention of the source of information of the intelligence note cannot be said to be non-compliance of any mandatory requirement. Besides, there is good reason for the practise of not mentioning the identity of the source of information in the intelligence report itself. For, the intelligence report was likely to be made part of record during

the trial, in which case the information provided therein may expose the resource person to avoidable risk. The identity of the informant or whistle-blower in such a serious crime, is required to be protected. Suffice it to observe that non-disclosure of the source of intelligence report received by P.W.1 cannot be said to be fatal to the prosecution case.

10. On receipt of the intelligence report, the Zonal Director called upon his subordinates Sanjay Gokhale(P.W.2), Prasanna S. Nambudari(P.W.3) to his cabin on 16th June, 1999 and told them to proceed. Both P.W.2 and P.W.3 have spoken about such instructions given by the Zonal Director. P.W.2 and 3 both were intelligence officer in NCB, Zonal office, Mumbai at the relevant time. In their evidence they have stated that as per the instructions of the Zonal director they reached at the spot at Mazgaon Garden at about 7 a.m. on 17th June, 1999. P.W.3 has stated that after waiting for 2-3 minutes his other colleagues arrived on the spot at around 7 a.m. P.W.2 Gokhale has stated that on reaching the spot he called independent persons available around that place to act as panchas. This fact is corroborated by P.W.3. One of the Panch

P.W.4 has also corroborated this position. All these witnesses P.W.2, 3 and 4 have consistently deposed that P.W.2 gave instructions to the members of the raiding team including panchas to spread out and watch for the beard person carrying plastic bag. It is stated that each of the member of the raiding party took position at different points and after waiting for some time, a beard person carrying sky-blue coloured bag arrived on the spot. He waited there for some time. Thereafter, two black persons of foreign origin arrived on the spot. Those foreign nationals talked to the beard person. Then the sky blue colour plastic bag was handed over by the beard person to one of the thinner and shorter amongst the two foreign nationals. Thereafter, signal was given to the raiding party to move towards these persons to grab them. As the team members progressed towards these persons, the beard person appears to have recognised the officers and shouted "NCB.. run". On that, all the three accused started running here and there. In so far as these events are concerned, all the prosecution witnesses are consistent. It is then deposed by these witnesses that P.W.3 started chasing the beard person, who had arrived first on the scene. P.W.3 has deposed that after chasing that person for some distance, he disappeared into some by-lanes and

was not seen thereafter. The fact that the beard person escaped is consistently spoken about by all the prosecution witnesses, who were members of the raiding team as well as the panch witnesses. These witnesses have also consistently deposed about the fact that the two foreign nationals were accosted on the spot and that a plastic bag was found in possession of one of them, who has been identified as Accused No.1. All the prosecution witnesses have later on identified each of the accused persons. The accused No.1 on interrogation disclosed that the contents in the plastic bag was contraband substance heroin. He stated that the same was procured from the beard person accused No.3, to be taken away by accused No.2 to Pune for sale. The substance of the prosecution case is that, accused Nos. 1 and 2 were accosted on the spot FLAGRANTE DELICTO. The abovesaid version of the prosecution witness has remained unshaken. Indeed, the attempt of the defence was to create doubt so as to infer that no such raid had taken place at all; whereas, the said accused were accosted in nearby hotel and taken to the police station; that panchanama was drawn at the police station and the like. However, on fair reading of the evidence of all these witnesses in isolation or as a whole, the conclusion reached by

the trial Court about their truthfulness and reliability of their version is unexceptionable. Thus understood, the theory propounded by the defence that the P.W.2 had no occasion to visit the spot prior to 2nd April, 2001, much less on the date of incident i.e. 17th June, 1999, is only stated to be rejected. That case put to the said witnesses does not take the matter any further for the defence. There is nothing on record to show as to why P.W.2 who was nominated by the Zonal Director to undertake the raid on 17th June, 1999 will have reason to fabricate evidence to indicate complicity of the appellants in the commission of the offence. Same analogy applies to the evidence of P.W.3. P.W.3 is also one of the Intelligence Officer, who was present on the scene and participated in the raid on 17th June, 1999. There is nothing on record to suggest that even P.W.3 had any reason or grouse against the appellants so as to falsely implicate them. P.W.3 also acted on the instructions of the Zonal Director and remained present at the spot at about 7 a.m. on 17th June, 1999. In the cross-examination of P.W.3, there is hardly anything, which would commend this Court to doubt the veracity or truthfulness of his version. There is yet another evidence of panch P.W.4, who is an independent person. His evidence

has been criticized by suggesting that he was an amenable witness. In asmuch as, he was a small time Vada Pav Vendor at Juhu which was far away from the place of incident. Besides, the reason for P.W.4 to remain present at the spot at such early hours about 7 a.m. is not reliable. However, all such criticism will have to be negated. For, P.W.4 has stood the test of gruelling cross-examination. He has offered explanation as to how and why he was present at the spot at about 7 a.m. on 17th June, 1999. The evidence of P.W.4 cannot be discarded merely because he happens to be a small time vada-pav vendor at Juhu. The minor discrepancies or trivial embellishments in the evidence will be of no avail to doubt the truthfulness and veracity of the evidence of P.W.4. Relying on the decision in the case of **Juwarsingh & Ors. Vs. State reported in AIR 1981 SC 373,** it was argued that for testing the credibility of witness, cross-examination is not the only method of discrediting a witness. Indeed, there can be no quarrel with that proposition. However, in my opinion, the trail Court has justly relied upon the evidence of the prosecution witnesses as truthful and reliable.

11. On considering the evidence of all these

witnesses, there is hardly any doubt that the raiding party was present at the scene of offence before 7 a.m.; whereafter, the accused No.3 arrived on the scene to be followed by accused Nos. 1 and 2. Accused No.3 was carrying a plastic bag in his hand containing the contraband item, which in turn was handed over to accused No.1. All these events have been witnessed by the prosecution witnesses P.W.2, 3 and 4. The prosecution witnesses are also ad-idem about the factum of escape of accused No.3 from the scene and of nabbing accused nos. 1 and 2 on the spot, with incriminating material with accused No.1. On this evidence, argument that there was no raid or for that matter the accused Nos. 1 and 2 were not accosted on the spot deserves to be only stated to be rejected.

12. In so far as evidence regarding search is concerned, that is in two parts. The first is regarding search of the plastic bag held by accused No.1, which was given to him by accused No.3 containing contraband item. The second search is of the person of accused Nos. 1 and 2 immediately after being accosted on the spot. Even with regard to the factum of search of both kinds has been consistently spoken by the prosecution witnesses P.W.2, 3 and 4.

In so far as search of plastic bag is concerned, there can be no question of infraction of section 50 of the Act, as is well established position by now. Even then prosecution witnesses have consistently deposed that the accused persons were appraised that they have right to be searched in presence of gazetted officer or Magistrate, if they so desired. The accused persons declined to avail of that offer. As stated earlier, so far as search of the plastic bag is concerned, requirement of section 50 of the Act will have no application, for which reason, it is not necessary to dilate any further on this matter.

13. In so far as search of person of accused Nos. 1 and 2 is concerned, in the first place, it will have to be held that compliance of mandatory requirement was observed by the Officials. At any rate, the issue of search of person of accused is concerned, the same is not significant in the present case; as no recovery of contraband item has been made from the person of the accused.

14. There is clear evidence that the accused were appraised that they have a right to be searched in the presence of the gazetted officer or Magistrate, which offer was not availed by them. That fact has

been established from the evidence of prosecution witnesses. The trial Court has rightly answered the same in favour of the prosecution. The argument that the accused persons were not familiar with the English language has also been rightly negatived by the trial court by adverting to the circumstances that would belie such a claim. The accused No.1 had come to India by sea route in the month of May, 1988. Since then he was staying in Mumbai. He claims to have lost his passport. However, from the evidence of P.W.7, which is corroborated by other evidence, it is seen that the said passport is recovered from the house, in which accused No.3 was residing. Similarly, the accused No.2 had arrived in India in the year 1988 and was staying in Mumbai till 1989 and thereafter, has been living in Pune. The passport of accused No.2 was with his wife, who is at Pune. The accused No.2 arrived in Mumbai on 14th June, 1999 and stayed at Aman Hotel,Mohamed Ali Road, Mumbai and on 15th June, 1999 shifted to Al Iziz Hotel, Colaba. Besides, the prosecution witnesses have clearly stated that they interacted with accused Nos. 1 and 2 and they were able to fully understand conversation. The said accused have given endorsement in writing in their hand writing refusing to avail of the opportunity to be searched before the

gazetted officer or Magistrate. That document has been proved. The contents of the panchanama drawn on the spot for seizure of the contraband items, contained in the plastic bag, held by the accused No.1, given to him by accused No.3, are substantiated by the evidence of prosecution witnesses. The independent panch P.W.4 has also supported the prosecution case in this behalf. Assuming the panch witness P.W.4 was not to support the prosecution case, that would not make the prosecution case any less acceptable having regard to the overwhelming material on record. It is well established that if otherwise the Court is satisfied from the material on record and in particular from the evidence of the seizing authority that such seizure was genuinely made, can answer the issue on that basis. **[See (2003) 3 SCC 726, P.P.Fathima Vs. State.].**

15. On analysing the oral as well as documentary evidence on record, there is no room to doubt the credibility of prosecution case with regard to the search and seizure procedure observed in respect of accused Nos. 1 and 2, who were accosted on the spot **FLAGRANTE DELICTO.** The witnesses have spoken about the proper procedure followed regarding search and seizure, substantiated from the panchanama. In other

words, there is no substance in the argument regarding any flaws in the procedure of search or seizure observed by the officials.

16. That takes me to the most contentious issue regarding preparation of sample to be sent to the expert or Chemical analyser. This fact is deposed by P.W.2. He has stated that after the small portion was taken out from the bulk which had tested positive of heroin on the field test carried on the spot, it was decided to take the sample weighing about 5 grams. from each of the packets. He has deposed that the substance in the polythene packet contained off-white colour powder. He has deposed that 5 gms of substance from each packet was taken out as representative samples from the quantity of 3 kgs. of heroin and put into polythene packet which was heat sealed. These three packets were further put in brown envelopes which were marked as S-1, S-2 and S-3 and details of the contents were written on the envelopes. He has stated that the envelopes were pasted and sealed with NCB Seal No.02. It is then stated that thereafter he, accused Nos. 1 and two panch witnesses put their dated signature on the envelopes marked as S-1, S-2 and S-3. The Polythene bag containing the balance quantity of 2.985 kgs of

heroin, was heat sealed and put into a carton, on which a label was affixed marking the carton as B, with details of contents thereof. He has then stated that he and accused No.1 and the two panch witnesses put their dated signature on the carton. The procedure adopted for taking out samples and for sealing the samples in separate polythene envelopes later on kept in brown coloured envelops which were sealed with NCB seal No.02 and signatures of the witnesses as well as accused and two panchas were obtained thereon. This evidence has remained unshaken in the cross-examination. The cross-examination on this aspect was only to create doubt or to suggest that it was improbable that the witness had carried the stationery, office seal, sealing material and two empty cartons with him, as can be noted from paragraph-44. The witness has asserted that on 17th June, 1999, he had left office for going to raid and had taken with him stationary, office seal, sealing material, two empty cartons. Besides he had taken some lengths of jute strings, envelopes etc. He has then stated that panchanama writing commenced only after accosting the two persons of foreign origin. He was asked whether he had told panch witness when he had discussed about the intelligence for which he had come prepared on

the scene with Lakh, cartons, stationary etc. That however, does not take the matter any further. The factum of taking out sample from each of the polythene packets to be kept properly in envelopes which is heated and sealed immediately and each sample packed and kept in brown envelop, which in turn was sealed and signed, has not been challenged at all. Even P.W.3 has deposed about the taking of samples from the bulk quantity and kept separately in sealed packet. The panch witness P.W.4 has corroborated the version of P.W.2. He has deposed that after the three packets in the polythene bag held by accused No.1 were unpacked, it contained off-white colour powder. The officer was carrying some apparatus for testing the said powder. After applying chemical drops, the officer informed that the powder was heroin. In that, the samples from each of the packets tested positive of heroin. Thereafter, the officer weighed the powder totally, which had weighed 3 kgs. He has then deposed that from 3 kgs. powder, the officer removed sample weighing 5 gms. and prepared three such packets of 5 gms each. He has deposed that powder was put in plastic packets, heat sealed by the officer in three envelopes, brought by the Officer. Thereafter, the contents as heroin was noted on the envelopes,

whereafter signatures were recorded thereon. He has deposed that the envelopes were shown to the panchas on which they had put their signatures. Even the accused persons signed on the envelopes. He has further deposed that plastic packets containing samples were put in individual envelopes and after signing on the packets, three sample packets were sealed by the officer. Interestingly, there is not even a single relevant question put to this witness regarding sample procedure or sealing procedure followed by the officer, in the cross-examination. On analysing the entire evidence, it is not possible to countenance the grievance of the accused about the improper sampling and sealing of the sample packets as such.

17. According to the appellants, procedure of sampling and sealing of sample packets was not conducted on the spot. It is not possible to countenance this stand. The evidence clearly supports the prosecution case that three samples weighing 5 grams each were taken out and sealed in envelopes on the spot. As mentioned earlier, there is no cross-examination of P.W.4 in respect of sampling and sealing procedure at all. It was argued for the appellants that it is incomprehensible that

sampling and sealing was done on the spot especially when according to the witnesses the entire procedure took some time. It is contended that it is inconceivable that such lengthy procedure was carried out in the open during the rainy season. Much stress was placed on the weather report, which has been produced on record to show that on the relevant day i.e. 17th June, 1999 it was a cloudy weather and could rain. Indeed, in the cross-examination of P.W.2, question was put as to whether it was raining on 17th June, 1999 from 7 a.m. to 10.30 a.m., to which he has answered that he does not recollect. The witness has then stated that it may have been raining. However, this is only a conjuncture. It is not the case of the defence that the samples and sealed packets were tampered/damaged because of rain. Whereas the suggestion was put forth only to assert that the procedure of sampling and sealing was not done on the spot, but elsewhere and more probably in the police station. However, having regard to the consistent and unshakable evidence adduced by the prosecution, it is not possible to entertain the theory pursued by the appellants.

18. It was then contended that the sample which was taken and sealed, the same sample packet was not

forwarded to the Chemical Examiner, or that the sample packet, which were received by the Chemical Examiner, was different and unconnected with the substance recovered from the appellants. In this context, it was argued that there was possibility of tampering with the sealed sample packet and for which reason the appellants deserved benefit of doubt. The argument regarding possibility of samples having been tampered was pressed relying on the evidence of the prosecution witnesses, which indicates that the seal was freely available and was not kept under lock and key. It was also contended that the sealed samples were not properly preserved under lock and key till the same was sent to the Chemical Examiner. Reliance was placed on yet another circumstance. In that, according to the prosecution evidence, the portion of the bulk tested on the field reported positive of heroin and described as Acetyl Morphine, whereas the Chemical Examiner, in his opinion, has found that the substance was diacetyl Morphine. It is also stated that the sample, which was prepared on the spot was obviously in powder form, but according to the Chemical Examiner, the contents of the sealed packet received in his office was in the form of lumps. Relying on these circumstances, it was strenuously argued that the sample, which was forwarded to the

Chemical Examiner or Foresensic Laboratory was either tampered or at any rate was not related to the case on hand, but some other case. It was also argued for the appellants that from the evidence of P.W.11 it is obvious that on receipt of this sealed samples, the same were immediately opened and thereafter, kept in the rack, which was accessible and there was possibility of tampering or mixing up of the sample with the samples of other cases. For all these reasons, it was argued that the accused deserves benefit of doubt.

19. The above said argument though attractive does not commend to me. Merely because the description given in the field report of the substance is as Acetyl Morphine, whereas the Chemical Examiner has found it to be diacetyl morphine is of no avail to the appellants. In fact, in the evidence of P.W.11 the matter stands fully explained. He has stated that Diacetyl morphine would mean that morphine is chemically treated with certain reagent to add two acetyl group of morphine. He has stated that the only other acetylated derivative of morphine is monoacetyl morphine. He has however, emphatically stated that monoacetyl morphine is not commonly used or available compound. He has also stated that while

analysing the subject sample, traces of monoacetyl morphine were also noticed. This version has come in the cross-examination at the instance of accused No.1, in paragraph-12. Thus understood, the field report prepared by the police officer to record the result of the field test conducted by him as acetyl morphine is quite natural. That does not mean that the substance recovered from the appellants was not a contraband item at all. If the substance also contains traces of mono-acetyl morphine and that fact has been noticed by the police officer, who conducted field test, that cannot be of any avail to the appellants. However, what is relevant for our purpose is the final opinion given by the Dy.C.C. as also the Chemical Examiner(P.W.11). They have unmistakably opined that the sample tested positive of diacetyl morphine, which is a contraband item. The experts have given the percentage of the contents of contraband item in his report. The fact that diacetyl morphine is notified as contraband item is indisputable. It is mentioned under the caption "Narcotic drugs" at serial No.3(b) in Schedule-(I) of the Rules of 1985. What is therefore, decisive is the finding of the Dy.C.C. and the Chemical Examiner who have stated that the sample tested positive of diacetyl morphine.

20. Perhaps realising this position, the appellants would contend that the evidence on record fully establishes that the samples which were collected from the scene of offence, the same samples were not sent for chemical examination. I have already analysed the evidence with regard to the fact of sampling and sealing on the spot. That evidence is quite natural and appears to be truthful, as is rightly found by the trial Court. There is no reason to doubt the correctness of that finding. What is then argued before this Court is that, there was possibility of the seal being removed and the sample being tampered at the later stage and fresh seal put on the packet. To buttress this submission, reliance was placed on **(1980) 3 SCC 303, State of Rajasthan V/s. Daulat Ram.** The exposition in that decision is on the basis of fact situation of that case. The Court had found that several samples were taken on January 24, 1968. The same were handed over to the Sub-Inspector of the Police Station on January 27, 1968. On February 29, 1968 the samples were forwarded to the public Analyst who refused to accept the same as the labels were not in order. Moreover, the prosecution took no effort to examine any witness to prove that the samples while in their custody were

not tampered with. In the present case, however, the Officer in whose custody the sealed sample packets were kept has been examined. There is evidence that the same packets were forwarded to the Chemical Analyser, who in turn had received the same in intact condition and in order. Significantly, there is nothing in the evidence to support the bald submission of the accused. No case or even suggestion is put to this witness by the defence to indicate possibility of tampering of sample or misuse of the seal. There is nothing to indicate that police officials had any inimical relation with the appellants, for which reason they wanted to tamper or change the samples so as to falsely implicate the appellants. The concerned officials, as is noted earlier, has proceeded in the matter on direction of Zonal Director. Merely because their evidence suggests that the seal was freely available in the office, by itself, cannot be the sole basis to draw inference that the samples, which were sealed on the spot were tampered before forwarding the same to the Chemical Examiner. In fact, the evidence of the officials regarding preservation of bulk as well as samples appears to be truthful. He has deposed the manner in which the bulk as well as samples were kept in safe custody till the same were forwarded on the

following day i.e. 18th June, 1999- one packet was sent to the DYCC and one packet was forwarded to Forensic Science Laboratory for examination. The Investigating Officer has emphatically stated that the samples were in his safe custody for one day till sent to the experts. It is next argued that no explanation is forthcoming as to how case number(C.R.No.) was given by the raiding Officials on the spot. This argument does not commend to me. As is noted earlier, the prosecution evidence establishes the search, seizure and sampling procedure, including of despatch and receipt of the sample packets in intact and in order condition by the chemical analyser. The fact that C.R.number is given on the spot can be no basis to doubt the overwhelming evidence indicating complicity of the accused. There is nothing unusual in police officials who were members of the raiding party attached to the NDPS cell in knowing the last C.R.number and of giving next number on the spot. It is inconceivable that after procedure of sampling and sealing was completed, the officials would then tamper with the samples. Nothing has been shown from the evidence on record or in the cross-examination to buttress the fact that the condition of the sample packets were such that an inference about possibility

of tampering can be drawn. Merely suggesting that there was possibility of tampering without anything more will be assuming too much, to give benefit of doubt to the appellants.

21. Reliance was placed on the case of **Valsala Vs. State reported in AIR 1994 SC 117.** Even this decision of the Apex Court is on the facts of that case. In para 3, the Court has indicated the issue it was called upon to consider. In that case, there was no evidence worth mentioning that the article seized was sealed and if so when. That is not the position in the case on hand. There is clear evidence of sealing procedure followed by the Officer and also of preservation of sealed packet in his custody. Besides there is clear evidence that the sample packets sent by the officer to the Chemical Analyser were received in intact condition and in order. Similarly, the view expressed by the Apex Court in the case of **State V/s. Bher Singh reported in 2003 Cr.L.R. (SC) 9 (See para 2)** and the case of **Gurbax Singh V/s. State, reported in 2001 AIR SCW 670(See para 9)=2001(3) SCC 28,** is in the fact situation of those cases and of no avail. Much stress was placed on the decision of our High Court in **Murata Chiharu V/s. State reported in 1998 All**

M.R.(Cri) 889. It was argued that this decision applies on all fours to the present case. In as much as, even in the present case, it appears that the seal was freely available, in which case the prosecution should fail. It is not possible to countenance this submission. Once again the opinion reached by the Court in that case was in the context of the fact of that case. This is clear from the discussion in para-8 of the Judgment. The Court first noted the admission of P.W.4 that he had not affixed seal impression of the seal used for sealing the contraband on the letter at Ex.P.W.1/A which was forwarded to the Director of Food and Drugs Administration for comparison with the seals used on the envelops containing drugs. The Court then observed that the prosecution was "unable to explain" the discrepancy as to how the seal was put by the official. In other words, it is matter of appreciation of evidence on record in that particular case. In the present case, however, the evidence on record reassures the Court that the sampling and sealing procedure was properly followed and there was no question of any possibility of tampering the sealed packets. Reliance is then placed on **State V/s. Ismail U. Haji Patel (2003) 12 SCC 291(Para 5)**. The opinion recorded therein is on the basis of

the facts of that case. The Court has found as of fact that there was no material brought on record to show as to where the seized articles were kept. That is not the position in the present case. Similar is the position in **State V/s. Gurmail Singh reported in 2005 Cri.L.J.1746**. In para 3 of the reported judgment, the Court has found that there was no satisfactory evidence that the seals found were in fact the same seals as were put on the samples after the seizure. In the present case, the prosecution witnesses have deposed to that effect. The version is corroborated, including by the evidence of P.W.11. Yet another decision is pressed into service, in the case of **Ouseph V/s. State, 2005 SCC (Cri) 595.** In para 3 of that decision the Court accepted the argument of the Appellant therein that contraband unsealed were kept with the investigating agency for nearly two months without being sealed, therefore, gave benefit to the accused. In this case, however, there is clear evidence about immediate sealing of samples and also of despatch of sealed packets on the next day itself to the experts for opinion. Besides, the office of Chemical Analyser received the packets in intact and properly sealed condition.

22. The appellants would however, contend that,

the possibility of tampering of samples was patent, as is reinforced from the condition of samples received in the Forensic Science Laboratory. According to the prosecution witnesses, when the sampling was done, status was of powder substance. However, P.W.11, the Chemical Examiner has deposed that the sample received in his office was powder containing lumps. Once again the argument is quite attractive, but overlooks the actual evidence on record. The prosecution witness in his examination in chief has described the substance as off-white colour powder. Even the panch witness has described the substance as powder. Here it needs to be noted that in the evidence, P.W.11 has clearly stated that he had compared and verified the sealed envelopes and thereafter opened the envelopes being satisfied that it was intact and in order. Indeed, he has stated that when the packet was opened, the sample was powder containing lumps. In paragraph 34 during the cross-examination, P.W.11 has stated that for brown powder to turn into lumps would depend on several factors, such as moisture, temperature and impurities. He has stated that there was remote chances of powder being transformed in the lumps, if the same is kept in sealed polythene packet. In my view, the prosecution witness has loosely described

the substance as powder. Whereas, what was sent for analysis was brown powder containing soft lumps. Significantly, it was not completely lumps, but brown powder containing lumps. Incidentally, from the cross of P.W.2, in particular para-52, it is apparant that the witness has denied the suggestion that when he poured the sample in the envelope it was hard lumps. The witness obviously has given the generic description of the texture as powder. Assuming that it is a case of misdescription of the texture of substance, to be loosely mentioned as powder or Off-white/Brown Powder by the police official in the panchanama. The question is, whether it makes any qualitative difference to the potency of the substance. To ascertain this position, Court question was put to P.W.11 as to whether any qualitative difference is noted in the potency if the original powder which transforms into lumps. The witness has stated that when the powder transforms in the form of lumps, there is possibility of degradation of heroin. He was then put second question by the Court to explain about the effect of degradation process on the analysis of percentage of heroin. He has stated that the same would be seen reduced. If it is so, it does not take the matter any further for the appellants. For, the final

analysis of the test conducted by P.W.11 showed high percentage of contraband contents in the sample powder.

22A. Much emphasis was placed on the change of the texture of the substance when it reached the Chemical Examiner. However, as I have already rejected the argument that sample which was sealed on the spot was later on tampered or the same sample had not reached the Chemical Analyser; with that finding, the argument of the appellant on any other basis, if entertained, will be doubting the earlier finding that the sample which was sealed, the same packet had reached the chemical examiner- as is stated by the Chemical Examiner(P.W.11) that it was received in intact condition and in order. Significantly, the prosecution has forwarded the samples not only to Forensic Science Laboratory, but one sample was sent to DYCC - who in turn has also opined that the substance therein was contraband item. But no argument has been advanced with regard to the said sample packet on the basis of which DYCC has recorded its opinion that the item contained therein was contraband item. Moreover, as is noted earlier, if the powder transforms partly into lumps, that will go to the advantage of the accused as the potency of

heroin gets degraded. Inspite of that the Chemical Examiner as well as DYCC has positively found that the substance tested positive of contraband heroin diacetyl morphine. It was also argued that the bulk was not properly preserved and produced in time in the court. Reliance is placed on the case of **Valsala V/s. State of Kerala, JT 1993(4) SC 549.** The view expressed therein is on the fact situation of that case. However, that argument will have to be stated to be rejected on the basis of evidence which has come on record in the present case. P.W.2 has clearly deposed about the manner in which the samples and the bulk was preserved. There is no reason to doubt the truthfulness of the said version. The sealed cartons were produced in Court and verified by the defence Counsel. The cartons had adhesive tapes affixed at all the four corners and even at the top. The condition of cartons was in tact and in the same sealed condition. The position was not disputed before the Lower Court. The totality of the evidence supports the prosecution case that the bulk kept in the cartons in sealed condition was kept in safe custody and was intact before the Court.

23. It was then contended that the opinion of the Chemical Examiner received in the form of reports

Exh. 26 and 27 was of no avail. For, the said reports lack necessary details. In absence of those details, the relevant fact and the ground on the basis of which opinion has been formed by the experts is not forthcoming and for that reason the appellants deserve benefit of doubt. In support of this submission, reliance was placed on the decision of our High Court reported in **1998(2) Mah. L.J. 884(Nickalus Peter Heel V/s. State of Goa) and 2004 All M.R.(Cri)3053 in the case of Raju G. Shrivastav V/s. State of Maharashtra,** in particular paragraph 34 thereof; which have taken a view that the Court is not bound to accept the evidence of Chemical Examiner, if it lacks material details. In the present case however, the prosecution has not only produced the two certificates Exh 26 and 27, but during the pendency of this appeal has produced additional evidence by examining P.W.11 Jayant P. Kulkarni, who was the Assistant Chemical Analyser at the relevant time in Forensic Science Laboratory, Kalina and had handled the analysis and reporting of the sample in question. In fact, the evidence of P.W.11 has come on record on the application filed by the accused No.2 in Criminal Application No. 3870 of 2003, which was filed by the said accused having regard to the amended provisions of the Act.

Assuming that reports Exh. 26 and 27 by itself were insufficient, however, after the evidence of P.W.11, there is hardly any doubt about the procedure adopted for analysis of the sample in question and the grounds, on which the conclusion is arrived. Each and every minutest aspect in this regard has been spoken by P.W.11-Chemical Analyser. He has been extensively cross-examined by the appellants. However, in my opinion, the evidence of P.W.11 has remained unshaken on every material aspect, such as receiving of sample in sealed envelope in intact condition, proper preservation of the samples after the sealed envelope was opened. The nature of test carried out and the necessity of repeating certain test. His evidence also indicates the basis on which conclusion is arrived at, only after being fully satisfied about the outcome of the result. He has also spoken about the fact that after the report was completed, intimation was given to the NCB to collect the same and it was so collected on payment of necessary charges. All these facts spoken by the P.W.11 have remained unshaken. In the evidence P.W.11 has given description of the nature of tests carried out and the grounds on which, he concluded in the report to form opinion that the percentage of heroin in sample in question was 11%. The material

version of this witness has been substantiated with the contemporaneous record maintained in his office. It is not possible to assume that even the office record so produced by P.W.11 was tampered. After considering the evidence of P.W.11, which will have to be juxtaposed with the conclusion recorded in reports Exh. 26 and 27, it is not possible to countenance the argument that this opinion of the Chemical Examiner can be discarded. For, the evidence is replete with necessary details. The reports and opinion of the Chemical Examiner was sought to be contradicted on the basis of finding recorded by the police official in respect of field test of the sample. I have already considered that aspect elaborately in the earlier part of this Judgment to hold that the description given by the police official in the panchanama seems to be quite natural and in no way contrary to the findings of the Chemical Examiner after analysis of the sample has been done. Further, it is the opinion of the Chemical Analyser which will be decisive.

24. That takes me to the last aspect of the matter. It was argued that the trial Court has placed emphasis on the statements of the accused recorded under section 67 of the Act. It was argued

that those statements were of no avail and cannot be looked into being inadmissible as the same has been recorded after the arrest of the appellants. In any case, the same have been recorded during the time when the appellants were under complete control of the police officials. Besides, it is submitted that the statements were not voluntary statements to be admissible in law, assuming the same fulfilled the requirement of section 67 of the Act.

25. Reliance is placed on **AIR 1973 SC 1196 Ramanlal B. Shah V/s. D.K.Guha; AIR 1978 SC 1025 Nandini Satpathy V/s. P.L.Dani; and Shahid Khan V/s.DRI reported in 2001 Cr.L.J.3183**, to contend that the accused has protection under Article 20(3) of the Constitution. This argument overlooks the established legal position that such protection would become available from the moment the person is arrested and taken into custody by the police as an accused in a given case. Till the stage of arrest, the person interrogated is not an accused and thus any statement made by him recorded during the course of enquiry under section 67 of the Act is not affected by section 25 of the Evidence Act. **[See (2005) 7 SCC 36 State v/s.Daulat Ram. Also see 2003 Bom.C.R.(Cri) 1309 Intelligence Officer v/s. Amjad**

Husein Khan]. Any such statement made can be used in evidence and will be admissible subject to being proved it to be voluntary, as it is not affected by section 25 of the evidence Act. In the present case, Accused Nos. 1 and 2 came to be arrested on 17th June, 1999 at around 22.00 hours as is established from the evidence of P.W.6 and P.W.3 and the arrest memos Exh. 70 and Exh.51 respectively. Whereas, their statements during the course of enquiry under section 67 of the Act were recorded earlier to that, being Exh.69(at pages 374-377) and Exh.50(at pages 280-283). The statement of accused No.1 has been corroborated by the evidence of P.W.8 and P.W.9 on certain matters stated therein. Those statements of accused Nos. 1 and 2 can be looked into, not the other statements recorded after their arrest. To get over this statement of the accused, it was argued that the said accused were under complete control of the investigating agency though a formal arrest memo was not prepared. This submission does not commend to me. For, even if the accused Nos. 1 and 2 were accosted on the spot with incriminating material, that does not mean that they were deemed to be arrested within the meaning of section 47 of the Criminal Procedure Code. Moreover, the law does not preclude, rather permits the investigating agency to

make enquiry with such person before causing his formal arrest. Thus understood, merely because the appellants were under the complete control of the investigating agency, that, by itself, cannot be the basis to discard such evidence, unless it is shown that it was not given voluntary. The fact whether the said statement of accused No.1 at pages 374 to 377 and of accused No.2 at pages 280 to 283 can be held to be voluntary and free from any pressure or coercion, the Court below has answered that issue in favour of the prosecution. There is nothing in the cross, not even suggestion, that the statements were recorded under coercion, fear or threat. No such grievance was made by any of the accused when produced before the Magistrate on the next date. The retraction in each case is much later, which is obviously under legal advise and after thought. On the analysis of the relevant evidence on record and taking totality of the said evidence, that seems to be a possible view. Even with regard to accused no.3, it is noticed that first his statement was recorded by P.W.2(Exh.43 at pages 228 to 231), before his arrest "in connection with the present case" at 16.40 hours on 10.4.2001 as per the arrest memo Exh. 40. Indeed, the other statement recorded after his arrest in the present case being Exh.44 and 45, will

be of no avail. In so far as statement Exh.43 is concerned, the trial Court on analysing the evidence on record has accepted the same to be voluntary. The view so expressed is a possible view.

26. It was argued that the appellants were not informed about their right to remain silent while recording their statements. Besides the summons issued to them misinformed them that it was mandatory to give their statement. For that reason their statements are product of misrepresentation, or fraud. Even if the appellants were not informed of their right to remain silent, it is incomprehensible as to how the disclosure made by them to the officials during enquiry under section 67 of the Act would become involuntary, muchless product of fraud. The argument virtually admits that the appellants have had made statements before the officials as were recorded. It would have been a different matter if the argument was that the contents of the statements recorded were never furnished by the appellants or that have been wrongly put in their mouth. That is not the argument of the appellants. There is no cross on the falsity of the contents of the statements on the material points. The appellants though entitled to remain silent, does not mean that

even if have made voluntary disclosure or disclosure of the true facts under mistaken belief that they were bound to make those disclosures to the officials, such a statement ought to be ignored. As is mentioned earlier, till the person is arrested by the police in connection with some offence, he does not become an accused. Any statement made by such person during the course of enquiry under section 67 of the Act can be used against that person in the trial of the case. The Statements of the appellants bear endorsement that the same was given voluntarily as per his say without any force, duress or coercion.

27. It was then contended that the statements have been later on retracted by each of the accused. That the retracted statements cannot be looked into. This submission overlooks the established position that even if confessional statement is subsequently retracted on legal advise or retraction is after thought, such retraction will be of no avail. **(AIR 2000 SC 402, Kalema Tumba V/s. State of Maharashtra; and (1997) 3 SCC 721, K.I. Pavunny V/s. Asst.Collector).** In the present case, the lower Court has found that the retraction by each of the accused was not bonafide but was on legal advise and afterthought. The basis on which the accused

asserted that it was a case of retraction, that basis has been answered against the accused. The finding so recorded is a possible view. Suffice it to observe that the statement of accused no.1-Exh.69 at page 374-377; accused no.2-Exh.50 at pages 280-283; and of accused No.3-Exh.43 at pages 228 to 231 spell out the role and involvement of the respective accused in the crime and of the fact that the same was given voluntary. Be that as it may, in the present case, in my opinion, the prosecution has succeeded in establishing the guilt of the accused beyond reasonable doubt, independent of statement recorded under section 67 of the Act. I have already dealt with this aspect in the earlier part of this Judgment.

28. It was argued on behalf of the accused No.3 that the day on which charge-sheet came to be filed against him, the only material, which was available on record to indicate his complicity in the commission of the crime was the statement under section 67 of the Act of co-accused. That material could not have been the basis to file charge sheet against the accused No.3 or for that matter to frame charge in view of the established legal position expounded in **2005 Cr.L.J.1827(Monish H. Bhalla V/s.**

Satya Prakash Bahi @ S.P.Bahi @ S.P. and ors.). Reliance is also placed on **Birendra Kumar Roy V/s. Hindustan Fertilizer Corpn. reported in 1995(4) Crimes 418.** This argument clearly overlooks the material evidence on record against the accused No.3 at the relevant time. The role of accused No.3 is spoken by the prosecution witnesses. In the intelligence report received, the possibility of involvement of accused No.3 was clearly mentioned. As per the said report, the Accused No.3 arrived on the scene at the appointed time and place carrying a plastic bag in his hand containing contraband item. He handed over the said plastic bag to accused No.1. Accused No.1 took possession of the said plastic bag. When this was happening, the raiding party started moving forward to nab all the three accused. The accused No.3 recognised the NCB officials and immediately shouted "run.. NCB". Thereafter, the appellants started running away from the spot. At that time, accused No.1 and 2 were accosted on the spot by the raiding party. This happened not only in the presence of police officials but also independent persons (panchas) who were asked to wait alongwith them. Accused No.1 and 2 were nabbed on the spot FLAGRANTE DELICTO. Indeed, the accused No.3 has been arrested subsequently and was identified by the

prosecution witnesses. With such kind of evidence on record which was already available before filing of charge-sheet and framing of charge against accused No.3, it is incomprehensible as to how prosecution could not have proceeded against the accused No.3. Disclosure made by co-accused was the additional material and not the only basis, as is sought to be suggested.

29. The Counsel for the Accused No.2 while relying on the decision of the Apex Court in **Abdul Rashid V/s. State reported in 2001 AIR SCW 2439** would contend that if the confession of Accused No.2 were to be discarded, in that case the only material would be that this accused was found in the company of the co-accused. That, contends learned Counsel, by itself, cannot be the basis to convict the accused No.2. The argument though attractive overlooks the fact situation of the present case. From the established facts in the present case the prosecution has succeeded in establishing the charge of abetment and criminal conspiracy under section 29 of the Act qua the accused in commission of crime in question. If the accused No.2 was not party to the criminal conspiracy there was no need for him to move alongwith accused No.1, to visit the spot at such

early hours with accused No.1, to be party to the handing over of the polythene bag containing contraband item by accused no.3 to accused no.1 which in turn was to be made over to accused no.2 for sale in Pune, to attempt to flee away from the spot. The accused No.2 has not explained the incriminatory circumstances. Suffice it to observe that the decision pressed into service is of no avail to the accused No.2.

30. It was argued on behalf of the accused no.3 that there was no legal evidence to record finding of guilt for offence under section 27A of the Act. It is submitted that postponed payment of the delivered offending item will not result in financing as such. At any rate, no offence under section 27A is made out against the Accused No.3 who was to receive the amount. The issue raised is only academic for our purpose. In para 67 of the impugned Judgment, the trial Court has made it clear that it was not imposing seperate sentence for offence under section 27A r/w 21 and 8(c) of the Act. That position is supported by clause 1 of the operative order passed by the trial Court. The order so passed has not been challenged before this Court. In other words, no sentence is awarded to the appellants for that

offence. This however, may not be considered as approving that approach of the trial Court. In as much as, if the offence is established the concerned accused should have been awarded commensurate sentence on each count.

31. Taking any view of the matter, the appeals are devoid of merits. Accordingly, the same are dismissed, while upholding order of conviction and sentence recorded by the trial Court against each of accused.

(A.M.KHANWILKAR,J)